IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3447 of 1999

WITH

SPECIAL CIVIL APPLICATION No 1659 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANOJBHAI MAGANLAL SOLANKI

Versus

SAHAYAK MAHITI NIYAMAK

Appearance:

1. Special Civil Application No. 3447 of 1999

MR MUKESH H RATHOD for Petitioner No. 1

MR PD BHATE, AGP for Respondent No. 1-2

2. Special Civil Application No. 1659 of 1999

MR PD BHATE, AGP for Petitioners

MR MUKESH H RATHOD for Respondent

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 29/01/2004

ORAL COMMON JUDGEMENT

1. Both these petitions arise from the same judgment and award of Labour Court, Rajkot in Reference (LCR) No. 58 of 1992 dated 12th November, 1998. They are heard together and now they are being disposed of by this common judgment.

2. Special Civil Application No. 3447 of 1999 has been filed by the original workman, who was applicant before the Labour Court, challenging the award to the extent that only 50% of the back wages have been awarded to him by the Labour Court instead of full backwages. Special Civil Application No. 1659 of 1999 has been filed by the Rural Broad-Casting Office of the State Government through its Sahayak Mahiti Niyamak i.e. Assistant Director of Information, challenging the award to the extent it directed reinstatement of the respondent of that petition i.e. the original workman together with continuity of service and also to pay 50% of the back wages. For the sake of convenience, the petitioner of Special Civil Application No. 3447 of 1999 is referred to as 'the workman' and its respondent as 'the employer'.

3. The facts of the case in nutshell can be stated as under :-

3.1. The workman was appointed vide order dated 29th June, 1990 as Mast Attendant-cum-Hamal on the monthly salary of Rs.1,360/= on ad-hoc and experimental basis for a period of one year. On 28th June, 1991 his service was terminated by a written order of the said date. The say of the workman is that though in the letter of appointment it was stated that his appointment was on the ad-hoc basis, actually he was appointed on account of the vacancy that had occurred on a permanent post with the transfer of one J.M. Solanki and that he had rendered continuous service for more than 240 days in a year in the said post. It was his case that he had all throughout served diligently and sincerely. However, he was relieved from the service vide order dated 28th June, 1991 without any justifying reason. His further grievance was that on his place one Mr. Nimavat who was junior to him, was continued in the employment. He, therefore, raised a dispute challenging his order of termination of service, which was placed before the Conciliation Officer. However, the efforts failed and ultimately the dispute was referred to the Labour Court by way of present reference under section 10(1)(c) of the Industrial Disputes Act, 1947 (hereinafter referred to as

'the I.D. Act').

4. Before the Labour Court the same averments were reiterated and it was prayed that he may be reinstated on his original post with full back wages since the order of termination of his service was passed without complying with the provisions of section 25 (F) and (G) of the I.D. Act.

4.1. The said claim was challenged by the employer on the ground that the appointment of the workman was purely temporary, ad-hoc and on experimental basis for a period of one year and, therefore, upon expiry of the said period, the employer was well within its rights to terminate his service. It was further contended that the employer was a Government Department and not an 'industry' within the meaning of provisions of I.D. Act and, therefore, the Labour Court has no jurisdiction and since the Bombay Civil Service Rules (B.C.S.R.) governed the field, the workman was required to approach the State Service Tribunal for the redressal of his grievances. It was lastly contended that since the workman was appointed purely on temporary basis, the employer was not required to follow the procedure as laid down under section 25 F of the I.D. Act as the termination did not amount to retrenchment under section 2 (oo) of the I.D. Act.

5. The Labour Court, on the basis of the material produced before it in the form of oral as well as documentary evidence, came to the conclusion that the workman had rendered continuous service of over 300 days in a year and therefore the termination simpliciter amounted to retrenchment and the employer was required to follow the procedure as envisaged under section 25 of the I.D. Act. The Labour Court also negatived the contention of the employer to the effect that it was not an 'industry' within the meaning of the provisions of the I.D. Act and the service of the workman was governed by B.C.S.R. and whatever the grievances on the part of the workman, they were required to be agitated before the State Service Tribunal and not before the Labour Court, by holding that such dispute or contention was never raised by the employer at the earlier stage i.e. before the Conciliation Officer and, therefore, it was not open for the employer to take such contention at a belated stage. In the opinion of the Labour Court the order of termination of the service was required to be quashed and set aside and it precisely did so. However, by considering the facts and circumstances on record it thought it fit to award only 50% of back wages while issuing direction to the employer for reinstatement of

the workman on his original post with continuity of service.

5.1. In these circumstances the present petitions have been filed, one for challenging the award to the extent it denied payment of 50% back wages to the workman and the other for the direction regarding reinstatement on the original post with continuity of service and payment of 50% back wages.

6. Mr. M.H. Rathod, learned advocate appearing for the workman in both the petitions has submitted that having held in favour of the workman on all counts the Labour Court has fallen into grave error in denying payment of 50% back wages. According to him, there is clear evidence of the workman that after termination of his service by the employer, he did not receive any job and he was not gainfully employed during all this period. His grievance is that the Labour Court has not assigned any reason for denying 50% back wages.

6.1. As against that, Mr. P.D. Bhate, Ld. AGP appearing for the employer has submitted that the employer is not an 'industry' and the Labour Court has no jurisdiction to adjudicate upon the present dispute. According to him, the field was governed by the B.C.S.R. and the workman was required to approach the State Service Tribunal for redressal of his grievances. He has further drawn my attention to the letter of appointment issued in favour of the workman and has submitted that the appointment was purely ad-hoc and on experimental basis for a period of one year and the workman had given written undertaking to owe the terms and conditions that had been mentioned in the said letter of appointment. It was now not open for him to say that the order of termination of his service was bad in law. He has lastly submitted that since the dispute that existed between the parties was not an industrial dispute and since the workman was appointed only on temporary basis, the employer was not required to follow the requirements of section 25 F of the I.D. Act before terminating his service.

7. Having gone through the record of these petitions and having carefully considered the submissions advanced by the learned advocates, it clearly appears that the workman was appointed on the post of Mast Attendant-cum-Hamal since one Mr. J.M. Solanki had been transferred from that post. The letter of appointment states that it was for a period of one year. However, the workman's contention was that it was a permanent

post, which has not been denied by the employer at any stage of the proceedings. It also appears from the record of the petition that the workman was holding the said post for a period of one year and there is evidence to that effect that he had rendered continuous service in said post for more than 300 days in a year. When that is the position, there is no error committed by the Labour Court while it came to the conclusion that even when the termination was a simple termination of service, the employer was required to comply with the provisions of section 25-F of the I.D. Act. Admittedly, that has not been done. Further an attempt has been made at this stage by the Ld. AGP to substantiate the order of termination by bringing to the notice of this Court a document annexed to its petition purporting to be a sheet containing the assessment of the performance of the work of the workman. It contains several adverse entries. According to Mr. Bhate, this was the reason why his service was terminated. However, this contention has been raised at very belated stage i.e. for the first time before this Court and the aforesaid document even does not form part of the record of the Labour Court. The same, therefore, cannot be taken into consideration. The only case that has been put forth by the employer is that it was ad-hoc appointment for a period of one year which could not be brought to an end without following any procedure of prior intimation. If that be so, as stated above compliance with the requirement of section 25-F was mandatory and that had to be followed by the employer, failing which the order of termination was required to be quashed. Secondly, when such mandatory provisions are required to be complied with, the compliance thereof cannot be avoided by resorting to the terms of the contract which may be contrary to it. When the statute provides for mandatory compliance, irrespective of the terms of the contract that is required to be followed and if the same is not done, the employer faces the consequences thereof. In the instant case is, there is no compliance.

7.1. So far the contention of the employer to the effect that it is not an 'industry' cannot be considered at this stage because the said contention was not raised by it at the earliest point of time and before the Conciliation Officer the proceedings were allowed to go on, on the basis that it was an industrial dispute. The employer having missed the bus, it cannot now be allowed to say that the provisions of I.D. Act do not apply, but the field is governed by the B.C.S.R. and the Labour Court has no jurisdiction. In that view of the matter, all the contentions raised by the employer in these

petitions fail and they are rejected.

7.2. So far the contention of workman with regard to nonpayment of back wages is concerned, in my opinion that has rightly been done by the Labour Court. It is very obvious that unless any source of livelihood is available to a person, he cannot survive for all these years. A judicial notice can also be taken to such fact. A faint attempt has been made by the employer to bring on record that the workman was gainfully employed somewhere else. However, it had not succeeded in doing so. But as stated above, when the person is without job for long, naturally he would find a way out to maintain himself till his grievance is redressed.

8. In view of the aforesaid, both these petitions have no merits and they are required to be dismissed and they are ordered to be dismissed. Rule discharged.

[AKSHAY H. MEHTA, J.]

* Pansala.